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Meeting of the Parties to the
Convention on Access to Information,
Public Participation in Decision-making and
Access to Justice in Environmental Matters

Working Group of the Parties
(Fourth meeting, 1-4 February 2005)
Item 7 of the provisional agenda

REPORT ON THE THIRD MEETING OF THE TASK FORCE ON ACCESS TO JUSTICE

1. The third meeting of the Task Force on Access to Justice was held in Geneva on 4-6 October 2004.

2. The meeting was attended by representatives from the Governments of Armenia, Azerbaijan, Belarus, Belgium, Bulgaria, Czech Republic, Denmark, Finland, Germany, Italy, Latvia, Netherlands, Republic of Moldova, Serbia and Montenegro, Slovakia, Sweden, United Kingdom and United States of America.

3. Representatives from the United Nations Environment Programme (UNEP) attended the meeting.

4. The following regional and non-governmental were also represented: Association for Environmental Justice (Spain), Association of Environment Counsellors (Japan), Earthjustice, Ecopravo-Lviv (Ukraine), European Association of Administrative Judges, European ECO Forum, Öko-Institut (Germany), Regional Environmental Center for Central and Eastern Europe (REC), and World Conservation Union (IUCN).

5. Mr. Marc Pallemaerts (Belgium), Chairman of the Task Force, welcomed the participants and opened the meeting.

I. ADOPTION OF THE AGENDA

6. The Task Force adopted the provisional agenda that had been circulated with the invitation to the meeting, with the addition of one new item under 'Any other business', namely the issue of the future work on access to justice under the Convention.

II. RELEVANT DEVELOPMENTS SINCE THE PREVIOUS MEETING

7. The Chairman informed the Task Force that letters had been sent to non-governmental organizations representing various legal professions, such as bars, the judiciary and associations of law schools, to draw their attention and to invite their input into the work of the Task Force, in particular with respect to the items in the reports of its first two meetings which emphasized the importance of collaboration with legal professionals. In addition , a similar letter had been sent to the Council of Europe, making reference to the relevant work of its formal consultative bodies and again inviting their input to the work of the Task Force.

8. REC reported that the Russian version of the Handbook on Access to Justice was now available on a compact disc. The same CD also included the English language version of the Handbook as well as several other guidance materials on the Convention. REC also informed the Task Force about the results of a TACIS project on environmental education, information and public awareness, which included the development of training materials, parts of which were relevant for access to justice. Another project had been initiated in cooperation with the Austrian Society for Environment and Technology (ÖGUT) and funded by the Governments of Austria and Finland to collect and present examples from various European States on mediation as a means of alternative dispute resolution. The collection could be used as a basis for recommendations and conclusions on good practices in the area of access to justice and could be used in the future work under the Convention.

9. UNEP informed the Task Force of training activities for members of the judiciary organized in cooperation with the United Nations Development Programme (UNDP) and the United Nations Institute for Training and Research (UNITAR) in South East Europe. After an initial needs assessment, a training course would be organized in March 2005 in Belgrade.

10. The Chairman reported on the first European round table of regional and local ombudsmen, organized by the Council of Europe (Barcelona, Spain 2-3 July 2004). The event had focused on the contribution of regional and local ombudspersons to protecting a number of rights, including the right to a healthy environment. As a speaker at the event, he had drawn the attention of the participants to the relevance of the Aarhus Convention for regional and local authorities and the potential role of ombudspersons in the implementation of its article 9.

11. The delegation of the Netherlands, on behalf of the European Union, presented information on the latest developments concerning the ratification of the Convention by the European Community. Discussions had been held to decide whether a new directive on access to justice was a prerequisite for ratification. The conclusion was that a regulation on the application of the Convention to European Community institutions and bodies should be given priority with a view to the European Community becoming a Party by the second meeting of the Parties (May 2005). The proposed directive on access to justice would not be part of the initial ratification package

but would be developed separately. However, in order to make progress on the draft directive before the second ordinary meeting of the Parties to the Convention, the issue was expected to be discussed by the Council before the end of the year.

12. The representative of Belarus informed the Task Force of the successful implementation of a national project on environmental legislation, including training for the judiciary, jointly implemented by the Ministry of Natural Resources and Natural Protection and the Organization for Security and Co-operation in Europe (OSCE).

13. The representative of Armenia reported on a project implemented together with OSCE that focused on training for judges as well as on a number of other developments and activities at the national level. A compendium of environmental legislation was being prepared. Although the law on the ombudsman had been in force for only seven months, a number of activities related to its application had already taken place. A consultative council had been established, involving experts from different sectors, and several court decisions had been issued making direct reference to the Aarhus Convention.

14. The secretariat reported on the status of ratification of the Convention and the Protocol on Pollutant Release and Transfer Registers (PRTRs). Most recently, the Czech Republic, Slovenia and Finland had ratified the Convention, bringing the total number of Parties to 30. With respect to the Protocol on PRTRs, no ratifications had been made so far.

III. IMPLEMENTATION OF ARTICLE 9, PARAGRAPH 3, OF THE CONVENTION

15. The Task Force resumed its discussion on the implementation of article 9, paragraph 3, of the Convention. The secretariat reported briefly on the responses received to a questionnaire on criteria for standing in the context of this article, which had been circulated before the meeting. The Chairman then summarized the previous discussions on this issue and invited experts to focus on the findings of the questionnaire and to again address the issues dealing with administrative and judicial procedures and their interpretation in environmental legislation (MP.PP/WG.1/2003/3, para. 18, 24 and 28, and MP.PP/WG.1/2004/3, para. 22 to 27).

16. The findings of the questionnaire suggested that, in many countries, the criteria for standing had been developed through case law. If no criteria for standing were laid down in the national law, it could be assumed that the public would have unrestricted access to courts. It was suggested that, since article 2, paragraph 5, of the Convention did not define a non-governmental organization promoting environmental protection, the criteria for standing for NGOs were interpreted differently in different countries. They included, for example, prior recognition of an association by administrative authorities or the nature and extent of activities conducted by an organization. Some participants invited the Task Force to consider drawing up conclusions on good practices to help countries develop criteria for standing, in particular with respect to non-governmental organizations, that would be consistent with the purpose of the Convention to broaden access to justice.

17. It was pointed out that, although in some countries ad hoc coalitions did not have access to courts because of concern that such access could be abused by NGOs set up by companies to bring cases against their competitors, this criterion should not be applied indiscriminately since cases of abuse were generally rare. In fact, this could significantly limit the public's access to

justice as in many cases ad hoc coalitions were formed in order to share expenses of litigation or to bring together a group of concerned individuals in response to a perceived imminent threat to a particular site.

18. The Task Force discussed the issue of the territorial scope of activity of an NGO as a criterion for standing. Several experts suggested that a clarification was needed on how the application of this criterion related to the provision on non-discrimination set out in article 3, paragraph 9. In some countries, only national organizations or those active in several regions could bring cases to court. In others, environmental rights were generally only recognized in national legislation as individual rights, which made it almost impossible for an NGO to bring cases to court at all.

19. Many participants considered that, given this diversity, it would be very difficult to agree on a set of recommendations that would recognize good practices in this area. Others felt that collecting information and cases from different legal systems would be useful and that agreeing on recommendations would help to clarify these issues, particularly in countries where criteria for standing were not clearly established in the national law, but constitutional provisions enabled direct application of international instruments in national courts.

IV. IMPLEMENTATION OF ARTICLE 9, PARAGRAPHS 4 AND 5, OF THE CONVENTION

20. The assistant to the Chairman, Ms. Christine Larssen (Belgium), presented a summary of the responses received to a questionnaire on non-legal obstacles to access to justice in environmental matters, which, in some cases, also contained suggestions for further work.

21. In response to a question about the mechanisms for limiting or reducing costs of review procedures and financing access to justice, and their main advantages and/or inconveniences, most respondents had referred to legal aid (i.e. finance) and/or legal assistance (i.e. advice) schemes. However, such schemes were not always available in all countries. The main disadvantages of these schemes were their inaccessibility to legal persons in most countries, the provision of insufficient funding to cover all expenses of a legal action and limitations on the selection of legal representatives. Other schemes that were mentioned included exemption from paying court fees in disputes involving compensation of damage caused by pollution; extensive use of administrative review procedures; recognition of standing for groups of individuals; and waiving the requirement for legal representation.

22. Most respondents said that the polluter-pays principle was rarely taken into account in reducing the cost of review procedures and/or financing access to justice. If it was, the polluter that lost a case would have to pay the expenses of the court procedure. This, however, seemed to apply only retroactively rather than in advance of a procedure. Some respondents suggested that a fund could be established from pollution fees, taxes, fines or forfeited gains to finance review procedures.

23. Mediation was mentioned as the most typical form of alternative dispute resolution. Its advantages included an increased probability of finding win-win solutions; savings in terms of both costs and time; and the voluntary nature of participation in mediation, which facilitated

ownership and acceptance of its outcome by all parties involved. In the specific case of the ombudsman, some participants emphasized the importance of this institution's independence. Concerns were expressed about the effect of mediation on third parties.

24. With respect to non-financial barriers to access to justice, delays were repeatedly mentioned as well as low rate of enforcement of court decisions, lack of expertise among legal professionals, poor understanding of the issues at stake among the general public and inadequate criteria for standing. The majority of respondents thought that the Task Force should address these issues by exploring means of increasing environmental awareness and knowledge through training and continuing discussion and exchange of information on these barriers. The Task Force could then compile good practices in this area or adopt recommendations on how to overcome such barriers. Some respondents, however, believed that these issues could best be addressed at the national level. Some participants proposed that they should be addressed in a forum involving the ministries of justice of Parties and Signatories to the Convention or equivalent bodies, especially since many issues discussed in the Task Force fell under their competence.

25. The Task Force revisited the issue of the costs associated with litigation. Unlike rather nominal court fees, the costs associated with expert and legal service fees could be quite substantial. If, moreover, the loser of the proceedings must cover the costs, this could have a chilling effect on public-interest environmental litigation. Limiting the application of such a rule that the loser of the proceedings would have to cover the costs might be considered, but could result in parties to the proceedings being treated unequally. In some countries such a rule applied only to court fees and each party covered its own expert and legal fees. While this would limit liability for a public-interest litigant, it would also mean that if an NGO successfully took a case leading to better enforcement of environmental law, it would nonetheless have to bear its own costs.

26. In countries where court experts were not available, the litigants had to advance the costs of technical and other expertise – a fact that put a significant financial strain on NGOs.

27. It was suggested that compensation for "pain and suffering" caused by litigation should also be considered when discussing costs as a deterrent in seeking access to justice. As a related matter, the obstacle posed by so-called strategic lawsuits against public participation was also mentioned.

28. Interim injunctive relief was considered to be important. Increase in and uncertainty about the costs associated with a defendant filing a reverse lawsuit for losses caused by delay, as well as requirements to post a bond to cover such losses, were mentioned, as was the issue of timing. In this context, the Chairman drew the attention of the Task Force to Recommendation No. R (89) 8 of the Committee of Ministers of the Council of Europe on provisional court protection in administrative matters.

V. POSSIBLE ELEMENTS FOR INCLUSION IN A DRAFT DECISION OF THE MEETING OF THE PARTIES

29. The Task Force resumed its discussion of possible elements for inclusion in a draft decision

of the Meeting of the Parties (MP.PP/WG.1/2004/3, annex). It made various amendments and agreed to transmit the draft decision, as revised, to the Working Group of the Parties for further consideration and transmission to the Meeting of the Parties, with unresolved issues indicated through the use of square brackets (see ECE/MP.PP/WG.1/2005/5/Add.1).

30. While most experts indicated support for the draft decision as a whole, some experts entered scrutiny reservations on certain sections or paragraphs. The experts from Denmark, Finland, Germany, Netherlands, Sweden and United Kingdom made general scrutiny reservations with respect to chapters III to V of the draft decision. The expert from Denmark indicated that her reservation applied especially to paragraphs 19, 21 and 32. The square brackets around chapters III through V are intended to reflect those scrutiny reservations. Some participants urged those with scrutiny reservations to work to lift these reservations in time for the meeting of the Working Group of the Parties.

VI. FUTURE WORK ON ACCESS TO JUSTICE

31. The Task Force was invited to discuss what further work on access to justice should be carried out under the auspices of the Convention's bodies and what form this work should take. There was a general agreement that a more informal, practically oriented approach was needed. Two specific proposals were made: the first focused on the use of workshops and electronic information tools to exchange information and further discussions on good practices in access to justice; the second proposal called for the establishment of a forum to hold further discussions on specific issues with respect to access to justice in environmental matters with representatives of ministries of justice or equivalent national bodies and with judicial authorities themselves, with the participation of representative organizations of the legal professions and other competent intergovernmental and non-governmental organizations. The Task Force decided to propose to the Meeting of the Parties through the Working Group of the Parties to consider an appropriate procedure and forum for this further work, subject to the scrutiny reservations referred to in paragraph 30.

VII. ADOPTION OF THE REPORT AND CLOSURE OF THE MEETING

32. The Task Force adopted the report of its meeting based on a draft and entrusted the Chairman and the secretariat with finalizing it, on the understanding that the French- and Russian-speaking experts would reserve their positions until the report was available in French and Russian as well.

33. The Chairman thanked all participants for their cooperation and contribution to the work of the Task Force, as well as the secretariat and the interpreters, and closed the meeting.